

INSINCERE AND INVOLUNTARY PUBLIC APOLOGIES

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Jeffrie Murphy deftly analyzes the limitations of apology within the criminal justice process. Authentic apologies do occur, but the institutional pressure of an overburdened and adversarial system pushes in the direction of hollow sound bites. Although I share Murphy's skepticism about public apologies, I disagree with his conclusion that apologies should be inadmissible altogether. Like other socially valuable behavior, such as cooperation with the government, remorse can be relevant to sentencing. And when judges exercise discretion within sentencing ranges, the defendant's apparent level of contrition can serve as a catch-all mitigating factor. Accounting for apologies may generate only marginal returns, but insincere apologies do little harm. Murphy's primary focus on the problem of false apologies is thus misplaced. Forced apologies, however, may produce significant distortions and warrant closer attention.

According to Murphy, we are "interested in apologies only to the degree that we believe that they are sincere external signs of repentance and remorse and reliable external signs of future atonement."¹ But there is a systematic interest in apology as a symbol not just of remorse but also of submission and willingness to engage in a prescribed ritual. Some public apologies are exchanges designed more to enforce authority than to heal discord. It is to this category that we should attend rather than debating the intractable issue of screening for insincerity.

As a practical matter, juries and judges are often quite good at determining whether someone is telling the truth, but they are ill-equipped to discern the underlying motives for speaking or to evaluate matters of conscience. When I served as a federal prosecutor, I witnessed perhaps a hundred conciliatory attempts at sentencing. The majority of them were just the sort of "public linguistic performances" Murphy considers insufficient to apologize for a substantial wrong. Their ultimate utility depended on whether the defense lawyer had artfully coaxed and effectively coached the client to make the conventional gestures. In court, these transactions have minimal transformative power. The most genuine moment of remorse I can recall arose in a case in which the defendant addressed his remarks not to the victims or the judge, but to his young children. Though moving, his statement had no impact on the sentence imposed. Apologies for serious offenses are nuanced, complicated, and ultimately personal. True reconciliation mostly happens outside the courtroom.

Although many in-court apologies are manufactured and misdirected, sentencing courts do not bother to label them as such if they bear outward indicia of credibility. Repeat players like judges, prosecutors, and defense lawyers well understand that defendants may be sorry they got caught but not necessarily sorry for their conduct. Of course, cynical apologies do little cultural work, but even "[f]aked remorse is better than nothing."² If "cheap grace" results in small discounts off sentences that already are plenty costly, that strikes me as an acceptable risk.

Involutionary apologies elicited without regard to the distinction between rewarding repentance and punishing silence may not be so innocuous. Murphy argues that apology advocates overestimate the degree of community in our society and the possibility of reintegration. Perhaps they have also underestimated the extent to which forced apology can deepen divisions. As Louis Michael Seidman explains: "There is something degrading about [an

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¹ Murphy Core Text.

² Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1850 (1999).

apology] ritual, and it is not only the participants who are degraded . . . we cannot help feeling a certain contempt for the weakness of the apologist coupled with fear and envy of the power exercised by the person who extracts the apology.”³ Shame, fear, and envy are not restorative emotions. Forcing apology on top of imposing liability may provide some “retributive satisfactions,” as Murphy notes. But it also causes expressive harm in terms of the moral capital of the criminal justice system. Moreover, the abject defeat of a compelled public apology may dehumanize and stigmatize more than it restores. In doing so, it may only alienate the offender further.

Rather than focusing on policing sincerity, it is worth considering how sentencing courts might avoid these counterproductive effects. Public apology will endure in its occasionally redemptive and often mechanistic way. But courts should only account for it while maintaining the distinction between discount and penalty, recognizing the “right to withhold apology,”⁴ and exercising caution in those cases in which authority animates the apology and the purported reconciliation is not with any victim but with the government itself.

³ LOUIS MICHAEL SEIDMAN, *SILENCE & FREEDOM* 26 (2007).

⁴ *Id.* at 27.